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No. 01-1212

IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILWAY COMPANY,
Petitioner,

v.

TAMERA LEE KAPITAN, Special Administratrix
of the Estate of RUDOLPH J. KAPITAN,
Respondent.

On Petition for a Writ of Certiorari to the Indiana Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed pursuant to Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.[1] Respondent has refused consent.

Amicus curiae AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak, the national intercity passenger railroad company. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great

[1] The letter expressing consent has been filed with the Clerk of the Court.

significance to the railroad industry as a whole—and in those instances such requests have been granted.[2]

AAR often participates as *amicus curiae* in cases which raise issues related to implementation of the Federal Grade Crossing Safety Program. 23 U.S.C. § 130. Under this law, and the regulations promulgated thereunder, Congress and the Secretary of Transportation established a uniform, nationwide, data-driven program for addressing hazards at rail-highway grade crossings, which requires states to identify crossings in need of safety improvements, and, with the assistance of federal money, to implement crossing improvement projects on a priority basis. AAR filed *amicus* briefs in two cases before this Court which addressed the role of railroads in the Federal Program, and the interplay between the Federal Program and state tort law which purports to regulate grade crossing safety. *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344 (2000); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

The respective spheres of federal and state law in regulating crossing safety, and in particular the adequacy of rail-highway grade crossing warning devices, have been clearly delineated by this Court. The ruling below is of great concern to railroads because its holding attempts to evade this Court's prior holdings that the installation of crossing warning devices results in the preemption by federal law of state law duties with respect to the adequacy of such devices. Alternatively, the decision below may be read as presenting an issue arising under the Federal Program that has not been directly addressed by prior decisions of this Court, but that has been dealt with in varying ways by lower courts. As a result, railroads across the nation, which participate in the

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[2] *E.g., National Railroad Passenger Corp. v. Griesser*, 122 S.Ct. 386 (2001); *Kansas City Southern Railway Co. v. Giddens*, 532 U.S. 990 (2001); *Metro-North Commuter R.R. v. Buckley*, 519 S.Ct. 958 (1996). All granting motion of AAR to participate as *amicus curiae*.

upgrade of hundreds of crossings each year under the Federal Program, cannot be sure of their obligations during the pendency of those projects. Railroads continue to face a large number of lawsuits in which the plaintiff asserts claims, based on state law, alleging that the crossing was equipped with inadequate warning devices. Thus, because this case presents an important issue which is likely to be faced by railroads with regularity, AAR seeks to file an *amicus curiae* brief.

When AAR participates in a case as *amicus curiae* it brings a broad, industry-wide perspective to the issues before the court. This perspective often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole. In addition to participating in numerous crossing cases as *amicus*, AAR has had a long-standing involvement with the Federal Program, including its work with the U.S. Department of Transportation (initiated prior to the Program's inception) to compile a grade crossing inventory, which serves as an important source of information for use in implementation of the Federal Program by federal and state authorities. Thus, AAR is thoroughly familiar with the issues that arise with regularity in crossing cases and their impact on the railroad industry.

For these reasons, AAR respectfully requests that leave to file the attached *amicus curiae* brief be granted.

Respectfully submitted,

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry. One such matter

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

is grade crossing safety and litigation resulting from accidents between trains and motor vehicles at grade crossings when it raises issues that may significantly impact the railroad industry.

Lawsuits arising out of grade crossing accidents have a significance beyond just the financial exposure faced by the defendant; this litigation also can serve as a forum for establishing the roles and responsibilities of various parties with respect to grade crossing safety. Typically, grade crossing suits include claims that the railroad negligently failed to provide adequate warning devices at the crossing. These claims have brought into focus the interplay between state common law rules related to crossings and the role of the federal government in grade crossing safety. Twice during the past decade, this Court has addressed that relationship and its impact on state tort law. *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344 (2000); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

AAR filed *amicus* briefs in both *Easterwood* and *Shanklin*, in which this Court addressed the question of when the Federal Railroad Safety Act of 1970 (FRSA), Pub. L. No. 91-458, 84 Stat. 971, and regulations issued by the Secretary of Transportation which implemented the Federal Grade Crossing Safety Program, preempt state-law duties, including tort claims alleging that the railroad negligently failed to determine the need for, and install, adequate warning devices. In those cases, this Court held that with respect to all crossings at which federal funds have participated in the installation of crossing warning devices, state law duties to select and install adequate warning devices are preempted by federal law. However, this Court has yet to address the question of what point during a federally funded crossing improvement project federal law displaces state law. Since *Easterwood* was decided, lower courts have answered this question in divergent ways. This lack of uniformity has

created great uncertainty regarding the role and duty of railroads with respect to grade crossing warning devices.

As of 2000, there were 155,370 public grade crossings on the nation's rail system. Federal Railroad Administration, *Railroad Safety Statistic Annual Report 2000*, 116, Table 9-1 (July 2001). Because grade crossings have such a pervasive presence on the rail network, the establishment and preservation of clear and uniform rules regarding the duty of the various entities with an interest in highway/grade crossing safety to determine the need for and to install adequate warning devices at crossings is a matter of great importance to AAR's member railroads.

Inasmuch as preemption in the context of grade crossing litigation has remained an important and recurring issue facing railroads, AAR has maintained a continuing interest in the uniform interpretation and application of the *Easterwood/ Shanklin* decisions by lower courts.[2] AAR can play a valuable role in bringing to this Court's attention the railroad industry's perspective on the issues raised by this important case.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of petitioner

SUMMARY OF THE ARGUMENT

Just as was the case in *Shanklin*, in this case passive warning devices where installed with federal funds at the crossing where the accident took place. Therefore, the lower court's holding that state law duties to select and install adequate warning devices were not preempted is inconsis-

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[2] For example, AAR is participating as *amicus curiae* in a case pending before the Ohio Supreme Court in which the plaintiff has argued that preemption did not apply to a crossing where warning devices were installed with federal funds because the devices were "experimental." *Bonacorsi v. Wheeling & Lake Erie R.R.*, 2000 WL 1679516 (Ohio App. 2000), *discretionary appeal allowed*, 744 N.E.2d 1196 (2001).

tent with this Court's precedent and should be summarily reversed.

In order to avoid a direct conflict with *Shanklin*, the lower court's opinion must be construed as reading *Shanklin* as holding that state law duties continue to apply until all mandated devices in a federal grade crossing improvement project have been completely installed. *Shanklin* did not so hold: however, the issue of when preemption applies during the course of a federal crossing project has been subject to varying interpretation by lower courts. Railroads have a strong interest in the establishment of a uniform rule on this issue because the spilt among the lower courts means that railroads are subject to differing duties at different times depending on the location of a crossing on their lines.

The lower court has held that railroads have continuing state law duties to select and install adequate warning devices at a time when the railroad has no decisionmaking authority, and its role, if any, is limited to that of a contractor fulfilling a contract with the state which is subject to the requirements of federal regulations and approval by the federal government, as is the entire process of implementing a federally-funded crossing upgrade. The lower court's ruling is inconsistent with the underpinnings of this Court's holdings that once decisionmaking authority over a crossing has shifted to the Secretary of Transportation, state law duties to select and install devices are preempted.

ARGUMENT

I. THIS CASE IS INDISTINGUISHABLE FROM *SHANKLIN* AND SUMMARY REVERSAL IS WARRANTED

As petitioner points out, this case is factually indistinguishable from *Shanklin*. That opinion makes clear that preemption under the federal regulations at 23 C.F.R.

§ 646.214(b)(3) & (4) apply equally to passive crossing warning devices as they do to active devices. Reiterating its *Easterwood* decision, the *Shanklin* Court explained that "§§ 646.214(b)(3) and (4) pre-empt state tort claims concerning the adequacy of *all* warning devices installed with the participation of federal funds." 529 U.S. at 357. (emphasis in the original) It is undisputed that at the time of the accident in this case passive warning devices–specifically, stop signs–had been installed with federal funds. Thus, the Indiana Court of Appeals was incorrect when, choosing to ignore or overlook the installation of the stop signs and deny preemption, it concluded that federally funded warning devices *"were not yet operational* at the time of" the accident.[3] (emphasis in the original) Because the lower court's decision is in direct conflict with this Court's decision in *Shanklin*, summary reversal is warranted.

II. THIS COURT SHOULD RESOLVE THE DISAGREEMENT AMONG THE LOWER COURTS OVER WHEN FEDERAL LAW BECOMES APPLICABLE TO A CROSSING IMPROVED WITH FEDERAL FUNDS

A. The Issue Raised by the Ruling Below, Which Was Not Addressed by *Easterwood* or *Shanklin*, Can Impact Numerous Grade Crossings

Part II of the Petition raises an issue of importance to the entire railroad industry which has yet to be addressed by this

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[3] The Indiana court's failure to consider the installation of stop signs with federal funds to be preemptive under *Shanklin* in insupportable given that under Indiana law stop signs posted at railroad crossings are clearly intended to alert approaching motorists to the crossing and affect their behavior. *See* Indiana Code Annotated § 9-21-4-16.

> When a stop sign is erected at a railroad crossing, the driver of a vehicle shall stop within fifty (50) feet but not less than ten (10) feet from the nearest track of the grade crossing and shall proceed only upon exercising due care.

Court, and on which lower courts have not forged a consistent, uniform rule. In order to reconcile its discounting of the federally funded stop signs in its preemption analysis with the precedent of this Court, the Indiana Court of Appeals construed *Shanklin*'s holding as grounded on the proposition that preemption does not apply to a crossing which is the subject of a federally funded crossing upgrade project until installation of every warning device within the project's scope has been completed. Although the court below referred to language in the *Shanklin* opinion as supporting its decision, the question of the point in time during a federally funded upgrade project when preemption is triggered was neither raised nor briefed in *Shanklin*, inasmuch as there was no dispute over whether the installation of the warning devices at the crossing in that case had been completed. The issue raised by the Indiana court's construction of *Shanklin* is fundamental to the question of federal preemption in the area of crossing safety and impacts every crossing that comes within the purview of the Federal Grade Crossing Program. 23 U.S.C. § 130.

Under *Easterwood*, preemption of state law occurs when federal standards, promulgated under the Federal Program, displace state standards for determining the adequacy of crossing warning devices.[4] Under the Federal Program, the

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[4] With the advent of the automobile and the growth and expansion of the national highway system, the federal government undertook a role in crossing safety, beginning in 1916 and culminating with the inception of the Federal Program in 1973. [*See* Petition pp.3-7]. For many years, there was no uniform system for determining the need for warning devices at railroad grade crossings despite the well-recognized interstate character of rail operations. However, recognizing that grade crossing accidents were a serious problem demanding a national solution, in 1973 Congress and the Secretary of Transportation created the Federal Grade Crossing Safety Program with the passage of the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282 (codified at 23 U.S.C. § 130), which for the first time created a nationally uniform system for surveying railroad grade crossings and determining the need for warning devices at those crossings.

federal government has established criteria, through regulations adopted by the Federal Highway Administration (FHWA), for adequate crossing warning devices. 23 CFR § 646.214(b)(3) & (4). These regulations set forth the crossing characteristics that require lights and gates (absent a recommendation to the contrary by a diagnostic team) and, where those characteristics are not present, make the determination of the type of warning devices to be installed subject to federal approval. By their terms, these regulations are applicable whenever federal funds participate in the installation of crossing warning devices. When they are applicable, the federal standards established by the regulations preempt any state law, including common law, which purports to establish an independent duty to select and install adequate warning devices at grade crossings. *Easterwood*, 507 U.S. at 670-71. Preemption under these circumstances flows from Congress' express intention to preempt state laws relating to rail safety whenever the Secretary of Transportation issues a regulation covering the subject matter of that state law. 49 U.S.C. §20106.

Despite the straightforward holding in *Easterwood*, some courts proved reluctant to give that decision its full effect.[5] This reluctance led to a deep split among the federal courts of appeals and resulted in this Court reconsidering the issue in *Shanklin*, a decision which simply reaffirmed the holding in *Easterwood*, albeit in somewhat more explicit terms. *Shanklin* disabused the lower courts of the notion that preemption does not apply where only so-called minimal signs are installed, where evidence is proffered to show that the federal regulations called for installation of different devices than were actually installed, or where evidence is not presented that the Secretary of Transportation issued an

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[5] *See Shots v. CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994)(declining to read the *Easterwod* decision "literally.") and *Shanklin v. Norfolk Southern Ry. Co.*, 173 F.3d 386 (6th Cir. 1999), *rev'd*, 529 U.S. 344 (2000).

individualized approval of a particular device. Despite its clarity on those questions, *Shanklin* did not address–because the issue was not raised–the disagreement among the lower courts over the point in time at which preemption is triggered. [*See* Petition pp.17-19]

Because the major railroads operate in many states over a large number of crossings, they have a strong interest in uniform application of the laws which impact their obligations at grade crossings. Just as the pre-*Shanklin* split over whether federal funding is the only necessary precondition for preemption led to non-uniform application of federal law, today, there is no uniform rule which establishes the point during the crossing improvement process at which federal, as opposed to state, law governs the subject of the adequacy of warning devices. Each year hundreds of crossing improvement projects are commenced nationwide under the Federal Program, and the question raised by this case is relevant to each and every one of those projects.[6] Therefore, resolving the question of when preemption is triggered is of great importance to railroads.

The significance of the quandary presented by this issue is illustrated by the two large railroads operating in the western part of the nation, the Burlington Northern Santa Fe and the Union Pacific. Each railroad operates in states included in the Tenth and Eighth circuits. In the states of the Tenth Circuit, preemption of state law occurs when, after committing itself to a crossing upgrade project, the federal government "expends significant federal resources on such a project." *Hatfield v. Burlington Northern R.R.*, 64 F.3d 559, 562 (10th Cir. 1995).[7] In *Hatfield*, the federal government's

[6] Two major railroads reported that during the five year period from 1997 through 2001, over 2000 crossing upgrade projects have been authorized under the Federal Program at crossings on their lines.

[7] Even in the Tenth Circuit, if a claim is adjudicated in state court in Oklahoma, a different result will obtain than if the same claim is heard in

authorization of preliminary engineering and selection of devices for the crossing, along with the expenditure of just over $600 for the preliminary engineering services, was sufficient to trigger preemption. In contrast, in the states of the Eighth Circuit, state law duties apply until "all the devices prescribed in the FHWA-approved upgrade plan are installed and operating." *St. Louis Southwestern Ry. Co., v. Malone Freight Lines*, 39 F.3d 864, 867 (8th Cir. 1994), *cert denied*, 514 U.S. 1110 (1995).[8] Thus, crossings on the lines of these two large railroads are governed by different rules, and the railroads' obligations with respect to their crossings will differ, depending on the state or federal circuit in which they are located.

B. The Indiana Court's Misreading of *Shanklin* Puts an Untenable Burden on Railroads and is Inconsistent With the Federal Regulatory Scheme

The decision below creates an untenable situation for railroads because it has the effect of continuing in force state law obligations to select adequate warning devices well beyond a time when the railroad has any discretion whatsoever in the decisionmaking process. At the time of the accident in this case, the crossing had become subject to decisions made by the state authorities in accordance with federal regulations

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federal court. *Akin v. Missouri Pac. R.R.*, 977 P.2d 1040 (Okla. 1999) (declining to follow *Hatfield*).

[8] While the holding in *Malone* is premised on the Eighth Circuit's notion that the public is not protected until installation of the warning devices is complete: "[a] plan to install devices and federal approval of a plan do not protect the public," 39 F.3d at 867, it fails to consider or address the regulations at 23 C.F.R. § 646.216(d)(2)(xi) and (e)(2)(iv) which *"cover the subject matter"* of interim protection during grade crossing improvement projects, thereby preempting state law claims regarding the adequacy of warning devices during the pendency of the project. *See* Petition at 21-22.

and subject to federal oversight. Even if the railroad had made a judgment that the project should have been carried out differently, it simply had no control over the decisionmaking process. The trial court in this case confirmed that the railroad had neither the duty nor authority to close the road until the project was completed. [*See* Petition at 22-23].

The role of the railroad is limited under the Federal Program, and any putative discretion to act independent of the Program vanishes once the process of upgrading a crossing has begun.[9] Federal law requires each state to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. §130(d). The process by which the states identify crossings which are hazardous, and develop and prioritize safety improvement projects, is subject to regulations at 23 C.F.R. Part 924, which require that implementation of federally funded crossing projects be undertaken on the basis of relative hazard ranking (to ensure that the potentially more dangerous crossings are upgraded first). *Id.* at §§ 924.9 & 11(a). As part of that ongoing process, railroads are to provide the state with data related to its train operations.[10] After identifying a crossing as a

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[9] During the process of revising the Manual on Uniform Traffic Control Devices, the Highway Administration explained that "[t]he FHWA and the Federal Railroad Administration have reviewed Federal law, regulations and guidance and found that although they encourage voluntary railroad involvement (as members of diagnostic teams where federal funds are involved) in the analysis of need for and type of protection, they do not impose on railroads the responsibility to make, or share in making, determinations of need for or selection of traffic control devices." Federal Highway Administration, *National Standards for Traffic Control Devices; Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD)*, 65 Fed. Reg. 78923, 78947 (Dec. 18, 2000).

[10] *See* U.S. Dept. of Transp., *National Railroad-Highway Crossing Inventory Update Manual* C-3 (1976).

candidate for possible upgrade, based on its survey, the state typically will convene a diagnostic team, which usually will include a representative of the railroad. As a result of a diagnostic review, a crossing may be placed on a state's schedule for upgrades. States must submit their schedule of projects to the federal government for approval.

When a crossing improvement project is submitted for federal funding, "[t]he costs of preliminary engineering, right-of-way acquisition, and construction incurred after the date each phase of the work is included in an approved statewide transportation improvement program and authorized by the FHWA are eligible for Federal-aid participation." 23 C.F.R. § 646.216(e)(1); *id.* 140.904(b). Typically, in each project involving active devices, the state will notify the railroad that a federally funded project is to be undertaken and authorize the railroad to provide preliminary engineering services and cost estimates for installation of the warning devices, *see id.* § 646.216(b)(1), usually accompanied by an express prohibition against doing anything further. The state will submit the input received from the railroad to FHWA. If the FHWA approves the preliminary plans, the state will prepare a contract covering the installation of the devices. *See id.* § 646.216(d). The contract for installation of the devices must comply with certain federal requirements and be approved by the federal government. *See id.* at § 646.216(d)(2) & (e)(2)(ii). With a federal go-ahead secured, the state also must authorize the acquisition of the traffic control devices and other materials. Once this is accomplished, upon FHWA authorization, the state will advise the railroad that it may proceed with construction. The final stage of the project is an on-site inspection by FHWA and the state. Federal funds participate in the installation of devices whether they are installed by the railroad or (as here, in regards to the passive devices) by another contractor. *Id.*

646.216(f).[11] The railroad or other contractor is reimbursed for services and materials in accordance with the terms of the contract by the state, which in turn seeks reimbursement from the federal government.

Not only is the Indiana court's reading of the law unfair to the railroad, it fails to take into account the operation of the federal regulatory scheme. Once the state makes a decision to install warning devices under the Federal Program–a decision that must be made pursuant to federal law and subject to the approval of the federal government–the railroad's role is simply to fulfill its obligations under the contract. By federal regulation, that contract must specifically provide, subject to FHWA approval, what protective services (which may include interim devices like stop signs) will be deployed during the installation process. 23 C.F.R. §§ 646.216(e)(2)(iv); 140.916. The decision below, however, is premised on the illogical notion that during the course of installation of warning devices the railroad maintains a state law duty (regardless of the contract) with respect to the adequacy of the warning devices at the crossing up until the time the very last wire, bolt and rivet of each device has been soldered or drilled into place.

Though not directly addressed, the prior decisions of this Court provide the analytical framework for determining the point during a Federal-aid grade crossing improvement project when preemption of state law occurs. In identifying § 646.214(b)(3)&(4) as regulations which cover the subject matter of the adequacy of warning devices, this Court explained that these regulations "displace state and private

[11] Usually, but not always, the railroad serves as the contractor to perform the work. The railroad is the logical candidate for this role, especially when active warning devices are to be installed, largely because the train detection circuitry in the rails, an essential part of any active device, must by synchronized with the railroad's signal and train control systems.

decisionmaking authority by establishing a federal-law requirement" with regard to warning devices. *Easterwood*, 507 U.S. at 670; *Shanklin*, 529 U.S. at 353. This Court further explained that in projects where federal funds participate, "the Secretary has determined the devices to be installed and the means by which the railroads are to participate in the selection." *Easterwood* at 671.

This Court's decisions focus on the shifting of authority over the crossing from the state (and state rules of law allocating responsibility) to the federal government. The transfer of decisionmaking authority over warning devices to the Secretary occurs "on any project where Federal-aid funds participate in the installation of the device," § 646.214(b)(3)(i), and the regulations could not be clearer that federal funds participate in the installation of devices whenever the contractor performs "preliminary engineering, right of way acquisition, [or] construction . . . after the date each phase of the work is included in an approved statewide transportation improvement program and authorized by the FHWA . . ." 23 C.F.R. § 646.216(e)(1). As the court in *Hatfield* explained: "when the [federal] government committed to preliminary engineering–both the financing of the improvement project and its direction and control were removed from [the railroad]." 64 F.3d at 562. The test established in *Hatfield* is designed to identify the point in time when the actions of the federal government manifest "a clear intent to require a federally approved warning device at the crossing in question." *Id.* Other courts have also focused on the question of where the decisionmaking authority lies. "The issue is not *what* warning system the federal government determines to be necessary, but whether the final authority to decide what warning system is needed has been taken out of the railroad's and the state's hands under 23 C.F.R. 646.214(b)(3) & (4)." *Armijo v. Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188, 1192 (10th Cir. 1996). "[B]y approving and funding grade crossing improvements, the

FHWA replaces state common law standards for measuring the adequacy of warning devices with its own regulations. . . . it is the identity of the decision-maker and not the accuracy of the decision that determines preemption." *Powers v. CSX Transp., Inc.*, 97 F.Supp.2d 1297, 1303 (S. D. Ala. 2000).

The case law underscores the notion that the key event is the ceding of control over the crossing to federal authority. In a number of cases, plaintiffs have argued that when passive devices have been installed under the Federal Program, a subsequent (yet unimplemented) determination that active devices are needed results in the elimination of any pre-emptive effect the passive devices carried. This view of preemption has been rejected unequivocally, notwithstanding the contention that a subsequent decision to upgrade the crossing indicates that the existing devices are no longer adequate under federal standards to "protect" the public. "[W]hether conditions at the crossing have since changed such that automatic gates and flashing lights would be appropriate, is immaterial to the preemption question." *Shanklin*, 529 U.S. at 359. *See also Bock v. St. Louis Southwestern Ry. Co.*, 181 F.3d 920, 923 (8th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000). The court in *Powers* noted that "[r]egardless of how many times the FHWA approves additional or replacement warning devices at a crossing, it is still the FHWA making the selection decision." 97 F.Supp.2d at 1304. Similarly, in *Union Pac. R.R. v. Sharp*, 952 S.W.2d 658 (Ark. 1997), the Supreme Court of Arkansas rejected the argument that the need for additional devices at a crossing should affect the preemption analysis because it "ignores the fact that the regulations have stripped the railroad of any decision-making authority to determine what type of warning devices are needed at a particular intersection, and placed such authority in the FHWA." *Id.* at 667.

The lower court's ruling cannot be reconcile with either the federal regulatory scheme or this Court's reasoning in *Easterwood* and *Shanklin*. The court below would have

regulations which cover the duty to *select* proper devices become applicable only after the devices have already been selected and fully installed pursuant to federal law, but they would not apply during the pendency of the very process they cover. Practical considerations, as well as the need to comply with the steps set forth in the federal regulatory scheme (outlined above), dictate that some period of time will elapse between the initial decision to commence a federally funded crossing upgrade project and complete installation of all mandated devices. The complexity of the roadway and tracks at the crossing, and the configuration of nearby traffic signals, as well as the availability of electricity needed to operate the devices (including the possible need to negotiate with a local power company), all are variables that affect the timing of a project. In addition, lead time is needed to order signals and other hardware, and to schedule labor and equipment for the construction. Another factor affecting project implementation is that the state is likely to be simultaneously dealing with other railroads on other projects, while the railroad too is involved in other projects with agencies in other states.

For these very reasons the federal government has not left a void, but rather has comprehensively regulated the installation process, including the subject of interim protection. *See supra* at 11-12. Moreover, if a state determines that because of the potential dangerousness of a particular crossing[12] time is of the essence for completion of a project, it can require, in its contract with the railroad, completion by a date certain. If the railroad is not able to meet that requirement, another contractor may be sought.

The approach sanctioned by the court below would create the anomalous situation where, on the one hand, the railroad

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[12] A state can determine dangerousness on the basis of the USDOT Grade Crossing Accident Prediction Equations, a highly complex set of formulae described in the U.S. Dept. of Transp. *Railroad-Highway Grade Crossing Handbook* at 70-76 (2d ed. 1986).

may have entered into an agreement with a state regulatory agency governing the railroad's role with respect to the installation project, while simultaneously, on the other hand, the state, through its judiciary, may be imposing an independent duty on the railroad to select and install warning devices at the very same crossing. Even if the railroad is not the contractor selected to install the devices, the same impossible situation occurs, inasmuch as an agreement to which one arm of the state is a party would be in effect to upgrade a crossing in a certain way, while at the same time a different arm of the state could determine that a third party (the railroad) had a continuing duty to upgrade the very same crossing. It is ludicrous to take the position that during the relatively short time between the installation of the stop signs and the installation of the active devices–both of which were paid for with federal funds–the federal regulations which govern the adequacy of crossing warning devices did not apply to the Hendricks Street crossing. It is even more ludicrous to suggest that during that period, the railroad, at the time a contractor to the state to install the devices, somehow maintained a state law duty to exercise decision-making authority with respect to selection of warning devices at the crossing. The lower court's preemption analysis here, or lack thereof, simply cannot withstand scrutiny.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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